No's. 11995, 11996, 11997

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 11995.

MARGIE LEE WALLAN, as Administratrix of the Estate of LANIER SARLES WALLAN, Deceased, etc.,

Appellant,

vs.

JOHN GILBERT RANKIN and R. S. NORSWING, copartners, etc., R. S. NORSWING, individually, and SHIRLEY LORRAINE RANKIN, as Executrix, etc.,

Appellees.

No. 11996.

THE FIRST NATIONAL BANK OF PORTLAND, as Executor of the Estate of JOHN B. ELIE, Deceased, etc.,

Appellant,

vs.

JOHN GILBERT RANKIN and R. S. NORSWING, etc., *et al.,*

Appellees.

No. 11997.

MILTON JAMES SCOTT THOMPSON,

Appellant,

vs.

JOHN GILBERT RANKIN and R. S. NORSWING, etc., *et al.,*

Appellees.

APPELLEES' BRIEF.

Appeal From the District Court of the United States for the Southern District of California, Northern Division

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No. 11995.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MARGIE LEE WALLAN, as Administratrix of the Estate of LANIER SARLES WALLAN, Deceased, for and on behalf of the surviving widow, MARGIE LEE WALLAN, and the surviving daughters, BARBARA LEE WALLAN and SUSAN JEANNETTE WALLAN,

Appellant,

vs.

JOHN GILBERT RANKIN and R. S. NORSWING, copartners, doing business under the assumed name and style of RANKIN AERONAUTICAL ACADEMY, and JOHN GILBERT RANKIN and R. S. NORSWING, copartners, d.b.a. RANKIN AVIATION INDUSTRY; R. S. NORSWING, individually, and SHIRLEY LORRAINE RANKIN, as Executrix of the Estate of JOHN GILBERT RANKIN, Deceased,

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No. 11996.

IN THE

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FOR THE NINTH CIRCUIT

THE FIRST NATIONAL BANK OF PORTLAND, as Executor of the Estate of JOHN B. ELIE, Deceased, for and on behalf of the surviving widow, MATILDA C. ELIE, and the surviving daugther, JACQUELINE ELIE,

Appellant,

vs.

JOHN GILBERT RANKIN and R. S. NORSWING, copartners, doing business under the assumed name and style of RANKIN AERONAUTICAL ACADEMY; JOHN GILBERT RANKIN and R. S. NORSWING, copartners, d.b.a. RANKIN AVIATION INDUSTRY; R. S. NORSWING, individually, and SHIRLEY LORRAINE RANKIN, as Executrix of the Estate of JOHN GILBERT RANKIN, Deceased,

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APPELLEES' BRIEF.

I.

Preliminary Statement.

On or about the 23rd day of February, 1947, at about the hour of 2:50 o'clock in the afternoon of the said day, an airplane operated by John Gilbert Rankin and owned by the Rankin Aeronautical Academy and/or the Rankin

Aviation Industries, copartnerships, of which one Robert S. Norswing was the copartner, took off from the Klamath Falls Airport in the City of Klamath Falls, State of Oregon, and shortly after the take-off crashed to the ground fatally injuring the pilot Rankin, as well as two of his fellow passengers, John B. Elie and Lanier Sarles Wallan, and injuring the fourth passenger, Milton James Scott Thompson.

As a result of this accident, three complaints were filed in the court below, being Civil Actions Nos. 706 and 707 [R. 11995, pp. 2-9; R. 11996, pp. 2-9], which were filed by the personal representatives of the deceased passengers duly appointed by the Circuit Court of the State of Oregon, suing for and on behalf of the surviving widows and children, the gist of said actions being for wrongful death and damage to property; and Civil Action 708 [R. 11997, pp. 2-9], which was filed by the surviving injured passenger, the gist of said action being for personal injuries.

In all three actions the parties defendant were the same:

(1) R. S. Norswing, individually and as surviving copartner of John Gilbert Rankin;

(2) Shirley Lorraine Rankin, as Executrix of the estate of John Gilbert Rankin, appointed by the Superior Court of Tulare County, California;

(3) John Gilbert Rankin and R. S. Norswing, copartners, doing business under the assumed name and style of Rankin Aeronautical Academy and/or Rankin Aviation Industries.

Motions to dismiss these complaints were filed by the defendants under Rule 12 of the new Federal Rules of Civil Procedure challenging the existence of a claim upon

which relief could be granted; capacity of the parties to sue and be sued and lack of jurisdiction over the subject matter. [R. 11995, 11996, pp. 9-10; R. 11997, pp. 8-9.]

The court below entered judgments sustaining these motions [R. 11995, 11996, pp. 11-12; R. 11997, pp. 10-11], from which judgments the appellants appealed. [R. 11995, 11996, p. 13; R. 11997, p. 13.] A stipulation by counsel for the respective parties was approved by the court consolidating the three cases for the purposes of this appeal.

II.

Statement of the Case.

The motions to dismiss challenged the sufficiency of the well-pleaded allegations of the amended complaints and raised several issues of law.

First, the allegations showed that the plaintiffs in Civil Actions Nos. 706 and 707 [R. 11995, 11996] were foreign administrators and executors appointed by the Circuit Court of the State of Oregon for Klamath County, and citizens and residents of that State; while the defendants were citizens and residents of the State of California. Do the plaintiffs have sufficient legal capacity to institute suit in the District Court of the United States for the Southern District of California?

Second, the allegations showed that the defendant Shirley Lorraine Rankin was sued as the executrix of the estate of her husband, John Gilbert Rankin, appointed by the Superior Court of the State of California. Does the defendant Shirley Lorraine Rankin have sufficient legal capacity to be sued in the said Federal Court?

Third, the allegations showed that the defendant R. S. Norswing was sued not as a joint tortfeasor but individually and as a surviving copartner of the alleged tortfeasor who perished in the accident. May suit be maintained for wrongful death and negligence against a partner of the alleged tortfeasor who died in the commission of the alleged tort?

Fourth, the allegations showed that the accident complained of occurred in the State of Oregon, while suit thereon was filed in the District Court of the United States for the Southern District of California. What law is to govern, the *lex loci delicti* or the *lex fori,* and what is the applicable law of the respective jurisdictions?

III.

Summary of Argument.

A. The Law of the Forum Governs as to All Matters Pertaining to Remedial as Distinguished From Substantive Rights.

B. The Capacity of an Executor or Administrator to Sue or Be Sued Is Governed by the Law of the Forum.

C. By the Law of the Forum, Actions for Wrongful Death and for Tort Abate With the Death of the Tortfeasor.

D. No Suit May Be Maintained for Wrongful Death or for Negligence Against a Surviving Copartner of the Alleged Tortfeasor Who Died in the Commission of the Alleged Tort.

ARGUMENT.

A. The Law of California Governs as to All Matters Pertaining to Remedial Rights.

The substantive rights of the parties to this action are governed by the law of the place where the right was acquired or the liability was incurred which constitutes the claim or cause of action. On the other hand, the law of the jurisdiction in which relief is sought controls as to all matters pertaining to remedial as contradistinguished from substantive rights.

Gray v. Blight, 112 F. 2d 696 (C. C. A. 10th, 1940);

Muir v. Kessinger, 35 Fed. Supp. 116 (D. C. Wash., 1940);

In re Vilas' Estate, 166 Ore. 124, 110 P. 2d 940 (1941);

Woollen v. Lorenz, 68 App. D. C. 389, 98 F. 2d 261 (1938);

In re Killough's Estate, 148 Misc. 73, 265 N. Y. Supp. 301;

Cf. Herzog v. Stern, 264 N. Y. 379, 191 N. E. 23, *certiorari denied* 293 U. S. 597 (1934).

Section 390 of the Restatement, Conflict of Laws, summarizes this rule in this language:

"(b) If a claim for damages for injury survives the death of the injured person or the wrongdoer, as the case may be, by the law of the place of wrong, recovery may be had upon it by or against the repre-

> sentative of the decedent, provided the law of the state of forum permits the representative of the decedent to sue or be sued on such a claim. Without such power created by the law of the state of suit, no recovery can be had."

In *Gray v. Blight, supra*, the plaintiffs, citizens of the State of Texas, brought an action against the administratrix of the deceased tortfeasor, a citizen of Colorado, for personal injuries and for damages to an automobile arising out of a collision which occurred in the State of Nevada and as a result of which the tortfeasor perished. Under the laws of the State of Nevada a suit for personal injuries did not abate by reason of the death of the wrongdoer but survived against his legal representatives. Under the law of the State of Colorado, in the Federal Court of which State the complaint was filed, the cause of action did not survive but abated by reason of the death of the wrongdoer. The defendant administratrix filed a motion to dismiss the action on the ground that the complaint failed to state a claim upon which relief could be granted. The lower court sustained this motion and the decision was affirmed on appeal. The Circuit Court of Appeals for the Tenth Circuit used this language at page 697:

> "The substantive rights of the parties to an action are governed by the *lex loci*, that is, the law of the place where the right was acquired or the liability was incurred which constitutes the claim or cause of action. [Citing cases in footnote.] Under the laws of Nevada a cause of action for personal injuries,

whether suit has been brought thereon or not, is not abated by reason of the death of the wrongdoer, but survives against his legal representatives . . . It follows that the cause of action survived the death of Blight. On the other hand, the law of the jurisdiction in which relief is sought controls as to all matters pertaining to remedial, as distinguished from substantive rights." [Citing cases in footnote.]

In *Muir v. Kessinger, supra,* the plaintiff minor, a citizen of Montana, was injured in Montana through the alleged negligence of the tortfeasor who died as a result of the accident. The tortfeasor was a citizen and resident of the State of Washington and the defendant was the administratrix of his estate. The common law rule prevails in Washington and a cause of action for tort under the Washington law does not survive. Under the law of the State of Montana where the action arose, there was a survival statute. This action was instituted in the United States District Court for the Eastern District of Washington. The defendant moved to dismiss for lack of jurisdiction, for the reason that recovery depended not upon the laws of the State of Montana but upon those of the State of Washington, and that under the laws of the State of Washington the cause of action did not survive. The motion to dismiss was granted.

In *Herzog v. Stern,* 264 N. Y. 379, 191 N. E. 23, *certiorari denied,* 293 U. S. 597, action was brought in New York to recover for personal injuries sustained by the plaintiff through the negligence of the defendant's testator

in an automobile accident which occurred in Virginia. Both the plaintiff and the testator were residents of New York at the time of the action, and the estate was being administered in that State. Under the laws of the State of Virginia such an action survived the death of the wrongdoer, while the law of New York provided no procedural machinery under which such an action could be maintained against an executor. The New York Court refused to entertain the action and said:

> "The question, however, is not whether the cause of action created by the laws of the State of Virginia survives the death of the wrongdoer, but whether the law of this State permits the representative of the deceased wrongdoer to be sued on such a claim. . . . At common law a claim for personal injury did not survive and could not be enforced out of the property or against the personal representatives of the deceased wrongdoer. The common law has in this regard not been changed by the Legislature. . . . Where neither common law nor a statute permits the bringing of an action against executors or administrators of a deceased resident, the courts of this State are without jurisdiction to pass upon such a cause of action. . . . The rights and obligations of executors and administrators appointed by our courts are defined by our law and our courts are without jurisdiction to grant a judgment binding on the executors or administrators appointed here unless our law makes provision for such actions against executors and administrators. Each State may define the rights and obligations of those who come within its territorial bounds and comity will ordinarily cause the sister states to permit the enforce-

ment of such rights and obligations against their residents by resort to their courts, but no state has any power to provide that such rights and obligations may be enforced out of the property of a deceased wrongdoer in the possession of executors or administrators appointed by the courts of another State. Here comity does not determine the jurisdiction of the courts of the decedent's domicile."

In re Vilas' Estate, 166 Ore. 124, 110 P. 2d 940 (1941), the Supreme Court of the State of Oregon recognized and applied the rule that the law of the forum in which relief is sought controls in all matters pertaining to remedial rights. In that case a resident of the State of Oregon was injured in an automobile accident which occurred in that State as a result of the negligence of a resident of the State of Washington who died in the accident. In Oregon an action for damages resulting from wrongful death survives the death of the wrongdoer, while under the law of the State of Washington the right to maintain such an action abates upon the death of the tortfeasor. The Oregon Court said:

"The law of the forum in which relief is sought controls, however, in all matters pertaining to remedial rights, and under the Washington law the right to maintain an action for unliquidated damages founded on the tort of the decedent dies with the tortfeasor. *Compton v. Evans,* 200 Wash. 125, 93 P. 2d 341. . . . Therefore, Bonnie Simms could not maintain in Washington an action against the administrator of the estate of Robert John Vilas, deceased." (Citing cases.)

B. The Capacity of an Executor or Administrator to Sue or Be Sued Is Governed by the Law of the Forum.

Under Rule 17(b) of the new Federal Rules of Civil Procedure, the capacity of an individual other than one acting in a representative capacity to sue or be sued shall be determined by the law of his domicile. In all other cases capacity to sue or be sued shall be determined by the law of the state in which the District Court is held. Therefore, under this rule the capacity of an executor or administrator to sue or be sued shall be determined by the law of the State of California.

Federal Rules of Civil Procedure, Rule 17(b), Title 28, U. S. C., Sec. 723c;

Cooper v. American Airlines, 149 F. 2d 355 (C. C. A. 2d, 1945), 162 A. L. R. 318;

Buttson v. Arnold, 4 F. R. D. 492 (D. C. Pa., 1945);

Kleckner v. Lehigh Valley Rd. Co., 36 Fed. Supp. 600 (D. C. N. Y., 1940);

Waltz v. Chesapeake & Ohio Ry. Co., 65 Fed. Supp. 913 (D. C. Ill., 1946);

Martineau v. Eastern Airlines, 64 Fed. Supp. 235 (D. C. Ill., 1946);

Rejsenhoff v. Colonial Navigation Co., 35 Fed. Supp. 577 (D. C. N. Y., 1940);

Ballard v. United Distilleries Co., 28 Fed. Supp. 633 (D. C. Ky., 1939).

C. By the Law of the Forum Actions for Wrongful Death and for Negligence Abate With the Death of the Tortfeasor.

1. The Doctrine of Clark v. Goodwin.

In California, the right to maintain an action for wrongful death or for personal injuries abates with the death of the wrongdoer and no action may be maintained thereon. Section 377 of the California Code of Civil Procedure is the wrongful death statute of this State, and this section authorizes an action only against the person causing the death. Ever since the decision of *Clark v. Goodwin,* 170 Cal. 527 (1915), by the highest Court of this State, our courts have held that such actions abate upon the death of the wrongdoer. In *Clark v. Goodwin,* an action was instituted by the plaintiff against the personal representatives of the deceased wrongdoer to obtain damages for wrongful death. The complaint showed on its face that the deceased wrongdoer had died prior to the commencement of the action. A demurrer was interposed to the complaint which was sustained by the lower court and affirmed by the Supreme Court of the State of California, the Court holding that the cause of action for wrongful death did not survive the death of the wrongdoer. The Court interpreted Section 377 of the California Code of Civil Procedure in this manner:

> "The action provided is, by the very words of the section, one *'against the person* causing the death, or if such person be employed by another person who is responsible for his conduct, then also against *such other person.'* Nowhere in our statute is there any intimation that such an action may be brought against any other person or persons than those so specified. It appears to follow irresistibly that as to such an

action the common law rules as to abatement of personal actions by death remain unimpaired in this state. . . . The authorities are uniform in supporting the conclusion we have reached that under such statutes as ours the cause of action for damages for the death of her husband given plaintiff by Section 377 of the Code of Civil Procedure, abated with the death of the alleged wrongdoer prior to action brought, and that such action cannot be maintained against his personal representatives."

See also:

Singley v. Bigelow, 108 Cal. App. 436, 291 Pac. 899 (1930);

De La Torre v. Johnson, 200 Cal. 754, 254 Pac. 1105 (1927);

Severns v. California Highway Indemnity Exchange, 100 Cal. App. 384, 280 Pac. 213 (1929);

Hunt v. Authier, 28 Cal. 2d 288 (1946), 169 P. 2d 913, 171 A. L. R. 1379.

2. The Doctrine of Hunt v. Authier.

In 1946, by a divided count, the Supreme Court of this State in the controversial case of *Hunt v. Authier,* 28 Cal. 2d 288, 169 P. 2d 913 (1946), 171 A. L. R. 1379, engrafted a qualification upon the rule laid down by the *Clark v. Goodwin* case.

Section 574 of the Probate Code of the State of California provides that executors and administrators may maintain an action against any person who has "wasted, destroyed, taken or carried away, or converted to his own use, the property of their testator or intestate, in his lifetime, or committed any trespass on the real property of the decedent in his lifetime; and any person or the personal

representative of any person, may maintain an action against the executor or administrator of any testator or intestate who in his lifetime has wasted, destroyed, taken or carried away or converted to his own use, the property of any such person or committed any trespass on the real property of such person." The question arose in the *Hunt v. Authier* case as to whether the injury suffered by the plaintiff in the unlawful killing of her husband was such an injury to property within the meaning of this section as to survive the death of the wrongdoer. In this case the widow and minor children of the deceased filed a claim against the estate of the wrongdoer for waste and destruction of their property, property rights and estate. The claim was rejected and the action was filed. The action was not brought under the wrongful death statute, for the reason that the wrongdoer was dead at the time the action was commenced. The plaintiffs relied solely on Section 574 of the Probate Code. The Supreme Court of this State held that as the wrongful killing of a person effects a lessening of the estate of his widow and children and an invasion and deprivation of their pecuniary interest and right to future support from the decedent, such tort amounts to an evasion of their property rights so as to entitle them to maintain an action therefor against the personal representatives of the tortfeasor under Section 574 of the Probate Code.

The Court in the *Hunt v. Authier* decision was cautious not to disturb the law of this State as applied to the abatement of causes of action for personal injuries and wrong-

ful death as distinguished from injuries to property. At the outset of the opinion this admonition was clearly given:

> "This action was not brought under the wrongful death statute (Code Civ. Proc., §377), for the obvious reason that the wrongdoer was dead at the time the action was commenced. . . . Such an action, in the absence of statutory provision for its survival, has been held to abate upon the death of the tort feasor (*Clark v. Goodwin,* 170 Cal. 527 . . .) Upon the death of Dr. Hunt a cause of action for wrongful death arose on behalf of the plaintiffs under Section 377 and continued to exist until the tort feasor's death."

In the *Hunt* case, the action was by a local guardian against a local administratrix as authorized by a local statute (Sec. 574, Probate Code). The redress for injury to property as authorized by Section 574 of the California Probate Code is not available to a foreign executor or administrator.

3. A Foreign Administrator or Executor Cannot Maintain Suit in This State.

A foreign representative cannot, by virtue of his appointment, administer upon an estate in California. Although this is statutory, the rule is only declarative of the common law.

Section 1913 of our Code of Civil Procedure provides that:

> ". . . the authority . . . of an executor or administrator does not extend beyond the jurisdiction of the government under which he was invested with his authority."

See also:

Estate of Rawitzer, 175 Cal. 585 (1917);

McCully v. Cooper, 114 Cal. 258 (1896);

Cortelyou v. Imperial Land Co., 166 Cal. 14 (1913);

21 Am. Jur., p. 852;

65 A. L. R., p. 563.

The plaintiffs (in Civil Actions Nos. 706 and 707 below), as executors and administrators appointed by the Oregon Circuit Court, are enjoined by the same statutory restriction and their letters lack extraterritorial force. The Oregon statute is almost word for word with our Section 1913 of the Code of Civil Procedure. See Oregon Laws, Section 2-723.

Therefore, the foreign administrators and executors cannot maintain their action under the Oregon wrongful death statute because the controlling law of the forum does not authorize such a suit and the ordinary rule of comity would not apply, for the reason that the Oregon survival statute is at war with the express statutory provision and general rule of law of this jurisdiction. (*Cf. McManus v. Red Salmon Co.,* 37 Cal. App. 133, 173 Pac. 1112 (1918); *Thome v. Macken,* 58 Cal. App. 2d 76, 136 P. 2d 116 (1943).) Nor may they prevail under Section 574 of our Probate Code, for the reason that their authority as personal representatives does not extend beyond the jurisdiction of the government under which they were invested with their authority.

Cf.:

Rybolt v. Jarrett, 112 F. 2d 642 (C. C. A. 4th. 1940);

Cooper v. American Airlines, 149 F. 2d 355 (C. C. A. 2d, 1945), 162 A. L. R. 313.

4. Actions for Personal Injuries Abate Upon the Death of the Wrongdoer.

In Civil No. 708 below, the plaintiff sued for personal injuries sustained as a result of the alleged negligence of John Gilbert Rankin. The complaint showed on its face that the alleged tortfeasor had died prior to the institution of the action. [R. 11997, pp. 2-9.]

Again, we look to the law of the forum for the remedial rights of this plaintiff and the capacity of the defendants to be sued.

In California, as discussed hereinabove, a cause of action for personal injuries (like a cause for wrongful death) does not survive the death of the person who wrongfully or negligently brought about those injuries.

Clark v. Goodwin, 170 Cal. 527 (1915).

Although such an action may be maintained under Oregon law (Sec. 8-904, Oregon Laws), comity would not dictate that the courts of California afford a remedy to a citizen of Oregon which is not available to her own citizens, and where such a suit would offend the express law of this jurisdiction.

Cf.:

Chambers v. B. & O. R. R., 207 U. S. 142, 28 S. Ct. 54, 52 L. Ed. 143 (1907);

Spokane & I. E. R. Co. v. Whitley, 237 U. S. 487, 35 S. Ct. 655, 59 L. Ed. 1060 (1915).

5. The Liability of the Defendant R. S. Norswing.

The defendant R. S. Norswing was sued individually and as a copartner of the deceased tortfeasor. There were no allegations that this defendant was a joint tortfeasor.

Although the liability of partners for torts committed within the scope of the agency is joint and several (Sec. 2409, Civil Code of California), there is no survival provision in the Uniform Partnership Act which authorizes a suit against a partner of the alleged wrongdoer who dies in the commission of the tort. In the absence of a statutory provision for survival, actions in tort abate upon the death of the tortfeasor.

Clark v. Goodwin, supra;

Hunt v. Authier, supra.

Cf.:

Phillips v. Gonzales, 44 Cal. App. 2d 267, 112 P. 2d 272 (1941).

Even applying Oregon law as to the defendant Norswing, the plaintiffs cannot maintain their action: Section 8-904, Oregon Laws, authorizes a cause of action for personal injuries or wrongful death only "against the personal representatives of the wrongdoer." The defendant Norswing is not alleged to be within that statutory category.

The appellants in their brief (p. 23) assert the position that where the liability for injury to the person is joint and several the death of one of the persons liable does not bar an action against the other, and cite in support of that position the following cases:

Sayles v. Peters, 11 Cal. App. 2d 401, 54 P. 2d 94 (1936);

Lee v. Deasy, 19 Cal. App. 2d 667, 66 P. 2d 175 (1937);

National Automobile Ins. Co. v. Cunningham, 41 Cal. App. 2d 828, 107 P. 2d 643 (1941).

The above cases cited by the appellants have no bearing whatsoever on the issues involved here. The cases cited by the appellants involved actions brought under Section 402 of the California Vehicle Code. Under this Code section, when the owner of an automobile permits another to drive it any negligence of the driver is imputed to the owner. However, the cause of action against the driver of the car abates on his death, although such death does not bar the cause of action against the owner whose liability is primary up to $5,000.00. Section 402 of the Vehicle Code does not speak on the subject of survival.

In *Phillips v. Gonzales,* 44 Cal. App. 2d 267, 112 P. 2d 272 (1941), the Court said:

> "The plaintiff contends the doctrine stated in *De La Torre v. Johnson, supra* [200 Cal. 754], has been abrogated by section 402 of the Vehicle Code, St. 1937, p. 2353. However, a careful reading of that statute shows it does not speak on the subject of abatement and survival of actions against the estate of a deceased person."

V.

Conclusion.

The judgments of the lower court sustaining the motions to dismiss the amended complaints should be affirmed.

Respectfully submitted,

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